No. 12783

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IGNACIO VALENCIA MARTINEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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Statement of the Case.

Counsel for the appellant herein has very accurately and fairly summarized the pertinent testimony in this action now on appeal. There was obviously a question of credibility and this was passed upon by the Trial Court, sitting without a jury, in favor of the prosecution. In other words, the Court believed the statement of the witness Rual Bell, a narcotics officer. The conflict in testimony came only in connection with the purported conversations between Bell and the defendant Martinez.

It is the appellee's position that if the statements of Rual Bell are taken as true, as they were by the Trial Court, there is absolutely no question of entrapment for the reason that Martinez made the initial overtures toward the

sale of narcotics by asking Bell, before any other conversation on the subject, if he was there to "pick up." It is agreed that to "pick up" means to buy narcotics.

If credibility is to be given to the statements of Martinez, as the Trial Court obviously did not, his testimony taken as a whole would indicate that Martinez required very little persuasion and was able to go around the corner and return immediately [Tr. pp. 74, 75] and make a delivery of narcotics and accept payment therefor without even stating a price. This should indicate Martinez' criminal inclinations, in the absence of any other proof, as it showed he knew the trade, had a source of supply immediately available, and understood and accepted the going price in the trade.

The appellee will rely on *Sorrells v. United States,* 287 U. S. 435 (1932), which is apparently the leading case. The only question will be the applicability of the law to the facts.

ARGUMENT.

The Evidence Is Sufficient to Sustain the Judgment of Conviction, There Being No Proof of Entrapment.

The defense of entrapment was first definitely recognized in the United States Supreme Court in the case of *Sorrells v. United States,* 287 U. S. 435, and the rule of that case has been widely followed by the lower courts, including this Court of Appeals in *Stein v. United States,* 166 F. 2d 851 (1948), and *Louie Hung v. United States,* 111 F. 2d 325. The doctrine of entrapment has only a limited application, however, and is applied only where the record shows that a defendant, otherwise innocent and having no previous disposition to commit a crime, is lured into committing a crime, against his will, by the inducement and urging of a decoy set up by the law-enforcement authorities.

The rule of the *Sorrells* case is well summarized at page 441 of the Supreme Court opinion, as follows:

> "It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War. Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation, but the question whether it precludes prosecution or affords a ground of defense, and, if so, upon what theory, has given rise to conflicting opinions.

"It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. *Grimm v. United States,* 156 U. S. 604, 610; *Goode v. United States,* 159 U. S. 663, 669; *Rosen v. United States,* 161 U. S. 29, 42; *Andrews v. United States,* 162 U. S. 420, 423; *Price v. United States,* 165 U. S. 311, 315; *Bates v. United States,* 10 Fed. 92, 94, note p. 97; *United States v. Reisenweber,* 288 Fed. 520, 526; *Aultman v. United States,* 289 Fed. 251. The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

Some recent cases following the *Sorrells* decision include the following:

United States v. Cerone, 150 F. 2d 382, 384, 7 Cir. 1945;

United States v. Brandenburg, 162 F. 2d 980, 982. 3 Cir. 1947 (wherein a long line of cases following the *Sorrells* decision is cited);

Ryles v. United States, 172 F. 2d 72, and 183 F. 2d 944, 10 Cir. 1948-1950 (where the inducement was similar to that in the present case except that the defendant was a known addict and addicts were used as decoys. Court held that there was no entrapment);

United States v. Roett, 172 F. 2d 379, 3 Cir. 1949.

There is a great difference in the facts between that case and the present one. Sorrells was affirmatively shown as having had a good reputation in the community and to have given way to persuasion only after an evening of reminiscences with a friend and the decoy, a man who had served in the same division in the army overseas. When defendant finally agreed to secure the liquor, he left his home and was absent nearly half an hour before returning with the same.

In contrast, if we take the appellant's own testimony in the present case, the alleged conversation to induce the appellant to obtain narcotics took only a few minutes and it took the appellant only long enough to go around the corner and return to produce the desired type and quantity. This time around the corner is set at only *two* minutes by Agent Bell and two other witnesses. Unlike the *Sorrells* case, there was no taking advantage of the friendship or comradery with the defendant and the very brief *alleged* references to "sick bitches" would hardly be such as to induce an innocent person to commit a crime.

If we look to the testimony of Agent Bell, which the Court accepted by its decision, Bell merely asked for Tony the Greek and then Martinez, the appellant, asked him if he was there to "pick up." [Tr. p. 27, line 5.] This was the first reference to narcotics. When the Agent replied "yes," Martinez informed him that the neighbor-

hood was too "hot" that day. [Tr. p. 27, line 18.] When the Agent set a time the next day to "pick up," Martinez said that would be all right. [Tr. p. 27, line 23, to p. 28, line 4.] The next day when he returned, the only question was "how much"? Martinez disappeared for about *two* minutes [Tr. p. 29, line 5] and returned with the narcotics and accepted payment without mention of price [Tr. p. 29, lines 9, 10]. Thus there was absolutely nothing from this testimony to indicate that the appellant was induced to commit a crime that he was not already committing or prepared to commit.

As we look at the evidence as a whole, it appears that the government agent merely gave Martinez the opportunity to violate the law. Judge Learned Hand approved this procedure in following the *Sorrells* decision in the case of *United States v. Becker,* 62 F. 2d 1007, 2 Cir. 1933, at page 1008, where he said:

> "It has been uniformly held that when the accused is continuously engaged in the prescribed conduct, it is permissible to provoke him to a particular violation which will be no more than an instance in a uniform series."

While it is true that evidence was not introduced on the past activities of the appellant, he admitted association with those in the neighborhood who handled narcotics, admitted his knowledge of the trade [Tr. p. 74, line 4, *et seq.*], and furnished the narcotics within two minutes' time. The inference is certainly permissible that this was not his first venture in the trade.

The Court of Appeals of this Circuit has passed on this question in *Stein v. United States*, 9 Cir. 1948, 166 F. 2d 851, and stated the rule at page 853 as follows:

> "At the trial of this case appellants relied heavily on the defense of entrapment and upon this appeal reiterate with equal fervor that the facts hereinbefore set out establish that they were entrapped and cite in support of such contention the case of Sorrells v. United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249, which holds that where a government agent instigates and induces the commission of a criminal act by a person otherwise innocent of any criminal intent and without previous disposition to commit the criminal act, the defense of entrapment is available. However, as appears here, where the government agents merely employ stratagem for the purpose of apprehending persons already engaged in criminal activities no case of entrapment is made out. See also, Louie Hung v. United States, 9 Cir., 111 F. 2d 325. In the instant case the possession of opium and the formation of the intent and purpose to violate the law existed before the government agents became aware of the situation. The arrangements made between the government agents were designed only to apprehend appellants in the furtherance of their criminal enterprise."

In *Ratigan v. United States,* 88 F. 2d 919, 9 Cir. 1937, we have the use of a decoy or stool pigeon. The language, at page 922, is pertinent:

> ". . . there is no entrapment in this case. The defendant was not led into a situation where he committed the act on motive or purpose of innocence on his part, or by the promise of 'stool pigeons' by display of purported authority that the defendant would

not be prosecuted, or upon such display of authority that the sale was no offense; all that was done by the stool pigeons was presenting themselves to the defendant soliciting the drug. There was no decoy solicitation, or conduct. What the defendant did was his free voluntary act. The 'stool pigeons' merely placed themselves in the way and afforded opportunity to purchase the drug."

In *United States v. Spadafora,* 181 F. 2d 957, 7 Cir. 1950, the Court said, at page 959:

"Where government agents merely offer the opportunity for the commission of a crime to one who already has the criminal intent, entrapment is not present. United States v. Lindenfeld, 2 Cir., 142 F. 2d 829."

In *Cratty v. United States,* 163 F. 2d 844, C. A. D. C. 1947, the Court cites that portion of the *Sorrells* decision heretofore quoted in this brief as the existing law. The facts in that case were very similar to this one in that the decoy conversationally asked for marijuana. Defendant denied having it in his possession and yet went away and came back with some.

These rules were well stated before the *Sorrells* case in *United States v. Pappagoda,* 288 Fed. 214 (D. C. Conn. 1923), a narcotic case where the agents furnished marked money, it was said at page 220:

"Thus it clearly appears that the defendant's position on this motion and plea are untenable, as matter of law as the stipulated facts do not bring the defendant within the ruling of the cases cited. If this prosecution was against Gaines, the situation would be different. The government agents did induce Gaines

to purchase narcotics, but there is nothing in the agreed statement of facts to show that they induced Pappagoda to commit any offense that he had not already committed or did not have the intention to commit, or was not fully able to commit. It would be a sad commentary on the law, if its officers were barred from receiving or soliciting such assistance as might be necessary to aid in detecting criminals while engaged in criminal pursuits. There are bounds beyond which no officer, in his zeal to make an arrest or secure a conviction, should go; but when the criminal intent originates in the mind of the accused; and the criminal offense is completed, the fact that an opportunity is furnished, or that the accused is aided in the commission of the crime, in order to secure the evidence necessary to prosecute him therefor, constitutes no defense. To the argument that the act is done at the instigation or solicitation of an agent of the government, the answer is that the intent of the detective is not to solicit the commission of the offense, but to ascertain whether or not the defendant is engaged in an unlawful business."

At pages 8 and 9 of the Appellant's Opening Brief, it is urged that the conversations between Bell and Martinez, as testified to by Bell, have a similarity to those in the *Sorrells* case. We submit that there is no similarity whatsoever because in the *Sorrells* case there was a persistent urging by the decoy, and a persistent refusal by the defendant, taking most of the evening, up until the time that the defendant finally succumbed to persuasion. In the present case, according to Bell there was no urging

whatever [Tr. p. 27, line 24, to p. 28, line 4] and according to Martinez himself, the so-called urging consisted of exactly two statements which might be construed as entreaties and the elapsed time was only a few minutes. Furthermore, these parties were strangers and there was no play upon friendship as in the *Sorrells* case.

The appellant further urges that when the defense of entrapment is injected into the case, the burden of proof shifts to the government to show that there was in fact no entrapment. (Op. Br. p. 10.) While the law is correct as stated where there is an applicable case, it doesn't apply here. In the first place, the first mention of entrapment in these proceedings was in the final argument of counsel for the defendant and was thrown in more or less as an afterthought. While the cross-examination of Bell and the examination of Martinez might have indicated that the defendant might argue that defense, the facts were so totally inapplicable to such a doctrine that it could hardly be said that the burden of proof would then shift to the prosecution to show that the defendant had a prior history of crime.

Conclusions.

The Trial Court was the trier of the facts and the judge of the demeanor and credibility of the witnesses. He obviously believed Agent Bell, the supporting testimony, and the statements of the defendant except for the claims of the defendant as to certain purported conversations. The background facts, shown by defendant's own admission

that after a short discussion he could go around the corner and immediately return with the desired narcotics, only served to corroborate the prosecution's witnesses.

The cases clearly hold that entrapment is a defense only to those without the prior inclination to commit a crime. A finding of absence of such a prior inclination in this case would be contrary to all of the facts in evidence and the inferences to be drawn therefrom. It is therefore respectfully submitted that the judgment heretofore rendered in this action should be affirmed.

Respectfully submitted,

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